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No. 88-1470

In the Supreme Court of the United States

OCTOBER TERM, 1988

LOUIS THEODORE FRIGARD AND MIRIAM CLAUDIA FRIGARD,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the United States may be held liable under the Federal Tort Claims Act for damages arising from the Central Intelligence Agency's alleged decision to use an investment firm in its covert operations.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 862 F.2d 201. The opinion of the district court (Pet. App. B1-B14) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 1988 (Pet. App. C), and a petition for rehearing was denied on October 7, 1988 (Pet. App. D). The petition for a writ of certiorari was filed on January 5, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners were private investors in an investment firm in Hawaii, the firm of Bishop, Baldwin, Rewald, Dillingham & Wong (BBRDW). Petitioners contend that BBRDW mismanaged their investments and that they lost approximately $310,000 as a result. Petitioners seek to hold the United States responsible for their losses on the theory that BBRDW was utilized by the Central Intelligence Agency (CIA) in connection with intelligence activities.

1. Petitioners filed this suit against the United States and the CIA under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, seeking $3,000,000 in damages for the allegedly wrongful conduct of employees, agents, and operatives of the CIA in permitting Ronald Rewald, the president of BBRDW, to defraud the firm's legitimate investors.[1] Petitioners alleged, *inter alia,* that respondents "made certain misrepresentations to [petitioners] that [petitioners] would receive a substantial return on their investments with BBRDW, and that the investment firm of BBRDW was a legitimate, reputable, qualified investment firm" (Compl. para. 21). Petitioners further alleged that respondents knew or should have known that "BBRDW was not a legitimate investment firm, but rather was a covert operation run by the CIA" (Compl. para. 22) as a "college [*sic*] of art and deception and as a counterpart for

[1] Creditors ultimately forced BBRDW into an involuntary bankruptcy. The district court presiding over those proceedings found that the business constituted a " 'Ponzi scheme' in which earlier investors were being paid off with new investors' funds." *In re Bishop, Baldwin, Rewald, Dillingham*, 779 F.2d 471, 474 (9th Cir. 1985). The district court in the bankruptcy proceedings also concluded that "Rewald had only 'slight involvements' with the CIA, and that Rewald considered himself a 'more important, undisclosed associate of the CIA . . . than he was in fact.' " *Ibid.*

this sordid espionage system that all of today's world governments have degenerated into" (Compl. para. 23). Finally, petitioners alleged that the CIA had acted in a grossly negligent manner because it neither cared about nor supervised BBRDW's activities on behalf of the investors "which the CIA trapped into bogus investments, and not only mulched [*sic*] the [petitioners] and other investors, but brought disrespect and dishonor on the United States Government and on one of its agencies" (Compl. para. 10).

This suit was stayed for 18 months pending the outcome of criminal proceedings against Rewald.[2] Pet. App. B1. Thereafter, respondents moved to dismiss the complaint on the grounds, *inter alia,* that petitioners' tort claims were barred by the discretionary function and misrepresentation exceptions to the FTCA, 28 U.S.C. 2680(a) and (h).[3]

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[2] On October 21, 1985, Ronald Rewald was convicted on 94 counts of mail fraud, interstate transportation of stolen securities or money, making a false statement to a federal officer, perjury, falsely representing accounts as being insured by the Federal Deposit Insurance Corporation, securities fraud, failure to maintain books and records as prescribed by the Securities Exchange Commission, fraud by an investment advisor, income tax evasion, and subscribing to a false document. He was sentenced to consecutive terms of imprisonment totalling 80 years and fines totalling $352,000 and was ordered to make restitution to the fraud victims identified in the indictment. Rewald's appeal of his conviction is still pending before the court of appeals. *United States* v. *Rewald*, No. 85-1353 (9th Cir.).

[3] Respondents also argued that the district court lacked jurisdiction over petitioners' contract claims because the amount of money damages sought exceeded $10,000 (see 28 U.S.C. 1491(a)(1) and 1346(a)(2)) and over the CIA, sued *eo nominee*. During the oral argument before the district court, petitioners conceded that the CIA was not a proper party and that the district court lacked jurisdiction over their contract claims. Cf. Pet. App. A4 n.1. Although the United States is now the only proper respondent, we shall use the term "respondents" because petitioners have named the CIA as a respondent in this Court.

Petitioners did not file a timely opposition to the motion to dismiss. In fact, it was not until three days before the scheduled hearing on the motion to dismiss that petitioners filed a brief in opposition to that motion. Although petitioners stated that the brief was also in support of a motion for leave to file an amended complaint, they did not file a motion to amend the complaint, as required by Fed. R. Civ. P. 7(b) and 15(a) and the local rules of the United States District Court for the District of Hawaii. Accordingly, at the hearing, the district court granted respondents' oral motion to strike petitioners' untimely response and the accompanying proposed amended complaint. Pet. App. B2. The district court thereafter granted respondents' motion to dismiss petitioners' original complaint with prejudice, on the ground that petitioners' claims were barred by the misrepresentation and discretionary function exceptions to the FTCA.[4] Pet. App. B1-B14.

2. The court of appeals affirmed (Pet. App. A1-A7). The court first noted that "[petitioners'] allegations include claims of the government's breach of a duty to warn investors of its involvement in BBRDW's operations and [of] the Frigards' reliance on these implied misrepresentations" (*id.* at A5). Concluding that "all of these claims are

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[4] In its order dismissing the complaint with prejudice, the district court observed (Pet. App. B1 n.1):

> The Complaint states that the allegations are based upon an affidavit by Ronald Rewald and reports in the media. Ronald Rewald was convicted on multiple counts of perjury regarding his affidavit. While this fact has no bearing on the present ruling it should be noted that I am accepting the facts stated in the complaint as being true. However, the fact that Rewald was convicted of perjury on these allegations may affect counsel's obligations with respect to any attempt to amend the Complaint. Rule 11, Federal Rules of Civil Procedure.

for 'damages from commercial decisions based upon false or inadequate information from the government,' " the court of appeals held that the district court had correctly ruled that the claims were barred by the misrepresentation exception to the FTCA (*ibid.*, quoting *Guild* v. *United States*, 685 F.2d 324, 325 (9th Cir. 1982)). Although the court of appeals noted that petitioners could reframe their complaint to exclude the misrepresentation claims, it determined that such an amendment would be futile because an action for mismanagement or negligent supervision of BBRDW's activities would in any event be barred by the discretionary function exception to the FTCA, 28 U.S.C. 2680(a), as construed by this Court in *Berkovitz* v. *United States*, 108 S. Ct. 1954 (1988), and *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984). Pet. App. A5-A7. The court first concluded that "the nature of the conduct at issue—the CIA's alleged use of BBRDW in its covert operations—require[d] [it] to apply the discretionary function exception" (*id.* at A6). In the court's view, "[b]ecause the CIA is charged by Congress with collecting intelligence, and because this charge involves elements of judgment and choice and strong public policy considerations, the decision as to how best to fulfill this duty is within its discretion" (*ibid.*). The court further concluded that the purpose of the discretionary function exception—to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy—supports application of the exception here, because "the alleged decisions by the CIA to use BBRDW and to keep its use of the company secret are administrative decisions grounded in social and economic policy" (*id.* at A6, A7).[5]

[5] On January 31, 1989, petitioners and numerous other persons who had invested in BBRDW filed an action in the United States

ARGUMENT

The court of appeals correctly concluded that petitioners' claims are barred by the misrepresentation and discretionary function exceptions to the Federal Tort Claims Act. Those holdings do not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Although the FTCA waives the sovereign immunity of the United States to damage suits sounding in tort, that waiver is not all-embracing. In particular, the FTCA does not waive the sovereign immunity of the United States to suits "arising out of * * * misrepresentation, deceit, or interference with contract rights" (28 U.S.C. 2680(h)). This Court has interpreted the exception broadly to cover negligent as well as intentional misrepresentations. *United States* v. *Neustadt*, 366 U.S. 696 (1961).

In this case, petitioners alleged that they were not told the complete story about BBRDW, that they relied on what they were told, and that, as a result, they suffered economic injury. This is clearly a claim arising out of misrepresentation. *Block* v. *Neal*, 460 U.S. 289, 296 (1983) ("the essence of an action for misrepresentation, whether negligent or intentional, is the communication of misinformation on which the recipient relies"). This is true regardless of how petitioners attempt to characterize their claim. *Neustadt*, 366 U.S. at 703. The court of appeals therefore was correct in its holding that petitioners' claims are barred by the misrepresentation exception. Indeed, petitioners do not even seek review in this Court of the

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Claims Court against the United States, seeking damages in excess of $10,000,000. They alleged that the sums they had invested in BBRDW had been taken by the government without just compensation, in violation of the Fifth Amendment. *Adams* v. *United States*, No. 55-89 C (Cl. Ct.).

court of appeals' application of that exception. For this reason alone, the Court should deny the petition for a writ of certiorari: the alleged misrepresentations concerning BBRDW are at the core of petitioners' claims.[6]

2. Petitioners' claims are also barred by the discretionary function exception to the FTCA, 28 U.S.C. 2680(a). The CIA has a unique mission to collect, produce, and disseminate intelligence information relating to national security. 50 U.S.C. 403(c) and (d); *CIA* v. *Sims*, 471 U.S. 159, 170-173 (1985).[7] This Court has recognized that in carrying out this mission, the CIA must consider complex questions of historical, social, and political policy, and that those decisions should not be second-guessed by the courts. See *CIA* v. *Sims*, 471 U.S. at 171-172, 173-180; cf. *Department of the Navy* v. *Egan*, 108 S. Ct. 818, 825 (1988).

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[6] Petitioners make repeated references to their "Proposed Amended Complaint." See Pet. 7, 8. However, as noted above, the district court granted respondents' motion to strike that complaint, and petitioners do not present for review by this Court any question concerning the correctness of that ruling. See Pet. i. Moreover, the proposed amended complaint contains some of the same jurisdictional defects as the original complaint. For instance, petitioners allege that among the "oral representations" that were "disseminated by employees, agents and 'consultants' of BBRD & W" were "[t]hat because of the work it performed for the United States Government, and/or its sponsorship by the CIA, BBRD & W had access to confidential intelligence information enabling it to make short term investments with extraordinarily high rates of return" (Pet. 8, quoting Proposed Amended Complaint). This is simply another claim of misrepresentation, which would be barred by the misrepresentation exception.

[7] Petitioners assert (Pet. 8-9) that the CIA "is not authorized to conduct operations within the United States." This assertion is incorrect; the CIA has certain domestic responsibilities. See Exec. Order No. 12,333, § 1.8(a), (c), (e), and (i), 3 C.F.R. 200 (1981), 46 Fed. Reg. 59,941-59,946 (1981). See also *CIA* v. *Sims*, 471 U.S. 159, 161-162 (1985) (discussing CIA research within the United States).

In this case, the court of appeals correctly found the gravamen of petitioners' complaint to be "that the CIA used BBRDW as a cover for its operations; wrongfully permitted Rewald, the firm president, to defraud investors; and misrepresented that BBRDW was a legitimate company" (Pet. App. A3). Such decisions to establish or use business entities to provide cover for CIA intelligence operatives are wholly within the discretion of the Agency, as are decisions concerning the degree of supervision that should be exercised over such entities. These decisions therefore are protected by the discretionary function exception. Compare *Varig Airlines*, 467 U.S. at 819-820 ("When an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind.").[8]

Petitioners contend (Pet. 7) that even if a discretionary function is involved, respondents would still "have to prove that they had no knowledge of facts from which they should have know[n] that Petitioners' funds were in danger of being lost or stolen" and that "they didn't know that BBRD&W employees were using the Government's name as a cover for their illicit activities." In other words, under petitioners' view, discretionary functions are protected by the statutory exception only if a court finds that the discretion was properly exercised. This view cannot be reconciled with either the language or the policy of the

[8] See *Varig Airlines*, 467 U.S. at 814 (in enacting the discretionary function exception, "Congress wished to prevent judicial second-guessing of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."); *Redmond* v. *United States*, 518 F.2d 811, 816-817 (7th Cir. 1975) ("It cannot be denied that the Government has a duty to maintain law and order, but how best to fullfill this duty is wholly within the discretion of its officers, and § 2680(a) excepts from the Act both discretionary functions and duties.").

exception. Section 2680(a) expressly immunizes the government from suit under the FTCA for discretionary acts or omissions, "whether or not the discretion involved be abused" (28 U.S.C. 2860(a)). By contrast, under petitioners' view, the government's protection from a damages suit "would fail at the time it would be needed" (*Dalehite* v. *United States*, 346 U.S. 15, 36 (1953))—namely, when the government is accused of tortious wrongdoing.

Petitioners also argue (Pet. 5) that under the court of appeals' ruling, the government will always be immune from suit because "[a]ny injury committed by a public employee can be considered to be legally caused by the decision to hire that employee; clearly, a discretionary function." This is a wholly unwarranted extension of the court of appeals' holding. As this Court explained in *Varig Airlines*, 467 U.S. at 813, it is "the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." Accord *Berkovitz* v. *United States*, 108 S. Ct. at 1958. The court of appeals recognized this principle (see Pet. App. A6), stating that the essential conduct at issue was "the CIA's alleged use of BBRDW in its covert operations" (*ibid.*).[9] Moreover, to the extent that petitioners *are*

[9] Petitioners also suggest (Pet. 5-6) that even if there was a discretionary decision by the CIA at some point, acts or omissions in furtherance of that decision would not be protected by the discretionary function exception. But as this Court held in *Dalehite*, 346 U.S. at 36, a discretionary function includes more than the initiation of programs and duties: "Where there is room for policy judgment and decision there is discretion. It necessarily follows that acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable." That is especially so where, as petitioners allege here, the acts or omissions implicate policy judgments regarding the degree of supervision that governmental officials should exercise over others.

challenging the selection or retention by the CIA of personnel or entities to carry out its alleged covert activities, their claim must fail because such choices would plainly be protected by the discretionary function exception. Cf. *Webster* v. *Doe*, 108 S. Ct. 2047, 2052-2053 (1988). See *Jet Industries, Inc.* v. *United States*, 777 F.2d 303 (5th Cir. 1985) (selection and supervision of participants in federal witness protection programs protected by discretionary function exception), cert. denied, 476 U.S. 1115 (1986); *Ostera* v. *United States*, 769 F.2d 716 (11th Cir. 1985) (decisions to use an informant with vicious propensities and to obtain his release from incarceration protected by discretionary function exception).

In a similar vein, petitioners contend (Pet. 6) that "by the Ninth Circuit's reasoning, a governmental employee who negligently operates a motor vehicle and injures a pedestrian while on official business, would be protected under the discretionary function exception, simply because the decision of the Government to use automobiles to carry out their official business is a discretionary function as well as a legal cause of the injury." This argument is unavailing. Petitioners' hypothetical lawsuit would have nothing to do with a governmental policy choice; this Court has already recognized that the drafters of the discretionary function exception "did not intend it to relieve the Government from liability for such common law torts as an automobile collision caused by the negligence of an employee * * * of the administering agency." *Dalehite*, 346 U.S. at 34. In the present case, by contrast, petitioners are challenging the implementation of an alleged CIA "cover" operation, which is far removed from the subject matter of common law torts and by its nature involves policy choices of a most basic kind. These choices concerns the best methods for obtaining intelligence to protect the national security, while at the same time pro-

tecting intelligence operations from unauthorized disclosure. Compare *Berkovitz*, 108 S. Ct. at 1963-1964; *Varig Airlines*, 467 U.S. at 819-820.

Finally, petitioners criticize (Pet. 6) the court of appeals for its reliance on *Georgia Casualty & Surety Co.* v. *United States*, 823 F.2d 260 (8th Cir. 1987), which held that the United States is not liable under the FTCA for torts arising out of an FBI undercover operation to apprehend automobile thieves. Petitioners assert that while the FBI activity in *Georgia Casualty* was secret, the CIA's alleged actions here were not.[10] But petitioners' own allegations that they did not know what was really happening at BBRDW indicate that at least to that extent, the alleged actions of the CIA were "secret." More important, application of the discretionary function exception does not depend on whether the governmental activity at issue is secret. The key question is whether the conduct involves considerations of public policy. *Berkovitz*, 108 S. Ct. at 1958. The CIA's alleged decision to use an investment firm as a "cover," and the manner in which any such decision would be implemented, necessarily involved public policy considerations of the highest order.

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[10] We note that in making this argument, petitioners rely (Pet. 7-8) on allegations in their proposed amended complaint, which the district court, affirmed by the court of appeals, denied petitioners leave to file and which therefore is not properly before this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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